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SUPREME COURT OF THE UNITED STATES ~~STANFORD~~ REDAK, JR., CLERK

October Term, 1976

No. . . . .

76-249

STANFORD ROBERT POLL,  
Petitioner,

v.

UNITED STATES OF AMERICA  
Respondent.

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAMES McGUIRE  
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Seattle, Washington 98119

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Stanford Robert Poll, petitioner, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered on June 25, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is printed in Appendix A, has not been reported at this date. No opinion

was rendered by the United States District Court for the Western District of Washington.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit, in an opinion filed June 25, 1976, affirmed the judgment of the District Court. A timely petition for rehearing was filed by petitioner and was denied July 20, 1976. A timely motion to stay issuance of mandate was filed by petitioner and was granted August 3, 1976.

This petition for writ of certiorari is filed within thirty days after denial of the petition for rehearing.

Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1) and United States Supreme Court Rule 19(1)(b).

QUESTIONS PRESENTED

1. Do successive federal prosecutions for related offenses arising from the same act violate the Fifth Amendment Double Jeopardy and Due Process Clauses where both offenses are within the jurisdiction of the District Court and are known to the United States Attorney when the accused is arraigned on the first indictment?

2. Did the evidence fail to establish beyond a reasonable doubt that petitioner willfully violated 26 U.S.C. § 7206(1) in view of petitioner's unrefuted evidence of an unintentional lack of financial resources to pay withholding taxes due and of his intent to pay the tax deficiency within the current tax year by liquidating business assets?

CONSTITUTIONAL, STATUTORY,  
AND OTHER PROVISIONS

United States Constitution, Amendment V:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . .

United States Code, Title 26, § 7202.

Willful Failure to Collect  
or Pay Over Tax:

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

United States Code, Title 26, § 7206.

Fraud and False Statements:

Any person who--

(1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made

under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and upon conviction thereof shall be fined not more than \$5,000, or imprisoned not more than three years, or both, together with costs of prosecution.

Federal Rule of Criminal Procedure 8(a):

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction . . . .

STATEMENT OF THE CASE

In 1973, petitioner Stanford Robert Poll, president of P. B. Industries, Inc., directed the corporation's bookkeeper to prepare a federal withholding tax return (Form 941) which understated by some \$10,000 the amount withheld from employees' wages during the first quarter of 1973. Petitioner did so because the corporation was experiencing severe cash flow problems and therefore lacked the

financial resources to pay the withholding taxes due. Petitioner, however, intended to pay the tax deficiency within the current tax year by liquidating corporate assets.

The bookkeeper prepared the undersigned return for petitioner's signature. The return carried the printed warning:

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Petitioner signed the return and it was filed with the Internal Revenue Service.

On March 19, 1974, petitioner was indicted for willful failure to truthfully account for and pay over taxes required to be withheld in violation of 26 U.S.C. § 7202. Petitioner's conviction was reversed on appeal and remanded because the district court had refused to admit relevant evidence concerning the willfulness

of petitioner's failure to pay over. United States v. Poll, 521 F.2d 329 (9th Cir. 1975) (Copy of opinion printed in Appendix B).

Instead of pursuing the first prosecution on remand, the government suspended further action and initiated a second prosecution under 26 U.S.C. § 7206(1) for willful signing of a false tax return under penalty of perjury. The second prosecution was initiated to permit the government to try the sole disputed issue of petitioner's willfulness under a lesser burden of proof. Petitioner was convicted under § 7206(1) following a non-jury trial on November 10, 1975.

The government did not move to dismiss the first prosecution until a conviction had been obtained in the second prosecution. An order of dismissal of the first prosecution was entered on December 5, 1975, the same day petitioner was

sentenced pursuant to his conviction in the second prosecution.

REASONS WHY WRIT SHOULD BE GRANTED

1. The Constitutional Protections Afforded by the Double Jeopardy and Due Process Clauses of the Fifth Amendment Require the Federal Government to Join in a Single Prosecution All Offenses Arising From The Same Act Which are Within the District Court's Jurisdiction and are Known to the United States Attorney When the Accused is Arraigned.

The element of willfulness has a constant meaning in the criminal tax offenses set forth in sections 7201-7207 of the Internal Revenue Code of 1954. United States v. Bishop, 412 U.S. 346, 359-60 (1973). By subjecting petitioner to multiple federal prosecutions to determine the single issue of the willfulness of petitioner's act, the government violated the Fifth Amendment's protection against double jeopardy and guarantee of due process.

Federal Rule of Criminal Procedure 8 governing joinder of offenses is

"designed to promote efficiency and economy and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of defendants to a fair trial."

Bruton v. United States, 391 U.S. 123, 131 n.6 (1968). Although Federal Rule of Criminal Procedure 8(a) encourages the joinder of related charges arising from the same transaction, the Supreme Court has not had occasion to decide whether compulsory joinder of federal offenses is required by the Fifth Amendment when the offenses arise from the same act. See Schaefer, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif. L. Rev. 391, 398 (1970).

In the absence of a determination by the court whether joinder is required of all federal offenses arising from the same act, the United States Attorney General has established administrative

policies to curb abuses caused by multiple prosecutions based on the same conduct. The court previously has been informed by the Solicitor General

that it is the general policy of the Federal Government that "several offenses arising out of the same transaction should be alleged and tried together and not made the basis of multiple prosecutions, a policy dictated both by considerations of fairness to defendants and of orderly and efficient law enforcement."

Petite v. United States, 361 U.S. 529, 530-31 (1960) (conviction vacated on government's motion). Accord: Marakar v. United States, 370 U.S. 723 (1962); Orlando v. United States, 387 F.2d 348 (9th Cir. 1967).

Despite the Court's determination that successive federal-state or state-federal prosecutions based on the same conduct do not violate the Double Jeopardy Clause, Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. United States,

359 U.S. 121 (1959), an analogous government policy substantially restricts such a course of action.

[N]o federal case should be tried where there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having first brought it to my attention.

Memorandum of Attorney General Rogers,  
April 6, 1959.

In three recent cases the Court vacated federal convictions on the government's motion, based on the Solicitor General's representation that the government continues to follow this policy against multiple prosecutions. Watts v. United States, 95 S. Ct. 2648 (1975); Ackerson v. United States, 95 S. Ct. 769 (1975); Hayles v. United States, 95 S. Ct. 168 (1974).

The application of the Justice Department's policies against multiple prosecutions remains discretionary. Nevertheless, the Court has deferred on several occasions to the Solicitor General's request that a federal conviction be vacated on the basis of these policies. E.g., Watts v. United States, 95 S. Ct. 2648 (1975).

By avoiding the issue whether the Constitution forbids multiple federal prosecutions and requires joinder of all federal offenses arising from the same act, the court has left this question to be resolved by the Executive Branch. As a result of the Court's deference to the Justice Department, the Executive Branch has been responsible for interpreting and implementing on a discretionary basis the constitutional limits on multiple prosecutions for federal offenses arising from the same act. No federal court, and particularly the Supreme

Court should conform its decisions to policies of the Executive Branch which the Judicial Branch has had no part in formulating. See Watts v. United States, 95 S. Ct. 2648, 2650 (Burger, C.J., dissenting). Thus, the Court should make its own determination whether the Fifth Amendment prohibits the government from subjecting petitioner to successive prosecutions for related federal offenses arising from the same act.

The fundamental protection of the Fifth Amendment is that

the [federal government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of insecurity as well as enhancing the possibility that even though innocent, he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

The underlying premise of the Double Jeopardy Clause is that

a person should not be harassed by successive trials; that an accused should not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Abbate v. United States, 359 U.S. 187, 198-99 (1959) (Brennan, J., separate opinion). "The prohibition is not against being twice punished, but against being twice put in jeopardy." United States v. Ball, 163 U.S. 662, 669 (1896).

Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury being subsequently convicted by another for essentially the same conduct. See Hoag v. New Jersey (U.S.) *supra*; cf. Ciucci v. Illinois, 356

U.S. 571, 2 L.ed.2d 983, 78 S.Ct. 839. Thus to permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." Palko v. Connecticut, 302 U.S. 319, 328, 82 L.ed. 288, 293, 58 S.Ct. 149. Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection. This protection cannot be thwarted either by the "same evidence" test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated.

Abbate v. United States, 359 U.S. 187, 199-200 (1959) (Brennan, J., separate opinion) (emphasis added; footnotes omitted).

Moreover, the principles embodied in the Due Process Clause prohibit the government from subjecting petitioner to separate trials for each offense. Whether the government may subject petitioner to multiple prosecutions, based on the same act to try the single issue of petitioner's willfulness, without violating the Due Process Clause depends on "whether such a course has led to fundamental unfairness." Hoag v. New Jersey, 356 U.S. 464, 467 (1958). See Ciucci v. Illinois, 356 U.S. 571, 573 (1958). See also Bartkus v. United States, 359 U.S. 121, 150-64 (1959) (Black, J., dissenting) "The pattern of due process is picked out in the facts and circumstances of each case." Brock v. North Carolina, 344 U.S. 424, 427 (1953).

The present case raises the question whether the government is free to suspend a prosecution held to be tainted by reversible error and to subject petitioner

to a second prosecution on a related charge arising from the same act where the government believes a conviction cannot be won in the first prosecution. Cf. Brock v. North Carolina, 344 U.S. 424, 432 (1953) (Vinson, C.J., dissenting). The government

falls short of its obligation when it callously . . . prevents a trial from proceeding to termination in favor of the accused merely to allow a prosecutor who has been incompetent or casual or even ineffective to see if he can do better a second time.

Id. at 429 (Frankfurter, J., concurring).

In the present case, the second prosecution was initiated against petitioner as an attempt to strengthen the government's chance of obtaining a conviction. The second prosecution was for a related offense arising from the same act. The second offense was known to the prosecution when the first indictment was obtained. The issue of petitioner's willfulness was the sole issue in both

prosecutions. Thus the initiation of the second prosecution to try the same issue of willfulness violated the Due Process Clause because the government's failure to join the second charge in the first prosecution was not the result of "extreme circumstances . . . contributed to by the defendant and beyond the control of the prosecutor . . ." Brock v. North Carolina, 344 U.S. 424, 437 (1953), (Vinson, C.J., dissenting).

The ninth circuit erroneously relied on United States v. Ewell, 383 U.S. 116 (1966), to affirm petitioner's conviction in the second prosecution. The ninth circuit's opinion suggests there are no restrictions under Ewell on the initiation of a second prosecution after a conviction has been reversed. The ninth circuit, however, overlooked the fact that in Ewell the second prosecution was not initiated until after the final termination of the first prosecution.

After reversal of petitioner's first conviction the government suspended further action on the first prosecution and initiated the second prosecution to try the sole disputed issue of petitioner's willfulness under a lesser burden of proof. The government did not move to dismiss the first prosecution until a conviction had been obtained in the second prosecution. The first prosecution was held in abeyance pending the outcome of the second prosecution, thereby subjecting petitioner to the threat of conviction from each prosecution.

Ewell is not authority for allowing the government to suspend one prosecution while initiating a second prosecution in order to strengthen its chances of obtaining a conviction. Petitioner's due process rights were violated by the government's retention of the first prosecution until a conviction had been obtained on the second prosecution. See

Brock v. North Carolina, 344 U.S. 424, 429 (1953) (Frankfurter, J., concurring). Moreover, in Ewell and the cases cited therein, the government had no choice but to commence a new prosecution to secure a conviction, whereas in the present case the government retained the right to proceed with the first prosecution on remand. Thus the government further violated petitioner's due process rights by suspending the first prosecution and using it merely as a "dry run" to test the strength of its case before commencing the second prosecution which resulted in petitioner's conviction. See Ashe v. Swenson, 397 U.S. 436, 447 (1970).

2. The Ninth Circuit's Affirmance of Petitioner's Conviction is in Conflict with United States v. Bishop, 412 U.S. 346 (1973).

The Supreme Court has determined that the word "willfully" has a constant meaning in the criminal provisions of the Internal Revenue Code of 1954, 26

U.S.C. § 7201-07. United States v. Bishop, 412 U.S. 346, 359-60 (1973). Bishop defined willfulness as "evil motive and want of justification in view of all the financial circumstances of the taxpayer." Id. at 360 (emphasis added). In reversing petitioner's first conviction, the ninth circuit stated:

We believe that to establish willfulness the Government must establish beyond a reasonable doubt that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

United States v. Poll, 521 F.2d 329 (9th Cir. 1975).

Petitioner's overall financial circumstances, therefore, are relevant to the determination whether petitioner willfully violated 26 U.S.C. § 7206(1). At trial, petitioner presented unrefuted evidence of an unintentional lack of

financial resources to pay immediately withholding taxes due. Petitioner also introduced unrefuted evidence of his intent to pay the tax deficiency within the current tax year by liquidating assets of his business. In view of petitioner's entire financial circumstances as established by petitioner's uncontradicted evidence, the government failed to prove beyond a reasonable doubt under the Bishop test that petitioner willfully violated 26 U.S.C. § 7206(1).

#### CONCLUSION

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES McGUIRE

Counsel for Petitioner

#### APPENDIX A

U.S., PLAINTIFF-APPELLEE v. Stanford Robert POLL, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, No. 76-1009, June 25, 1976.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT and CHOY, Circuit Judges, and WHELAN, District Judge.

CHOY, Circuit Judge:

#### Opinion

In 1973 appellant Stanford Poll, president of P.B. Industries, Inc., directed the corporate bookkeeper to prepare a false tax return, understating the amount withheld from employees' wages during the first quarter of 1973. Poll signed the return knowing it was false.

In March, 1974, Poll was indicted for the willful failure to truthfully account for and pay over taxes withheld from employees' wages during the first quarter of 1973, in violation of 26 U.S.C. sec. 7202. A second count charged a similar offense as to the second quarter of 1973. Poll was tried and convicted as charged. On appeal, this court reversed the judgment and remanded the case because the district court refused to admit relevant evidence concerning the willfulness of his failure to pay over. United States v. Poll, 521 F.2d 329 (9th Cir. 1975).

The government elected not to pursue the sec. 7202 charge on remand, but instead promptly secured a new indictment charging willful signing

of a false tax return under penalties of perjury, in violation of 26 U.S.C. sec. 7206(1). The new indictment contained only one count, pertaining to the first-quarter return, because the second-quarter return was submitted unsigned. Poll was again found guilty as charged, and sentenced to four months imprisonment and a \$2,500 fine.

On appeal from the second conviction, Poll raises three objections: (1) his conviction under sec. 7206(1) is in violation of the constitutional protection against double jeopardy; (2) the Government denied the appellant a speedy trial; and (3) the evidence was insufficient to support the conviction. We affirm.

#### Double Jeopardy

Poll acknowledges that the Government was entitled to retry him under sec. 7202 after his previous conviction was reversed. He contends, however, that the subsequent prosecution under sec. 7206(1), an offense not joined in the first indictment, violated the double jeopardy clause of the fifth amendment. He argues that since the violations of sec. 7202 and sec. 7206(1) arose from the same criminal transaction, that of filing a false tax return, they are the "same offense" for double jeopardy purposes.

We find that Poll's right against being subjected to double jeopardy has not been violated. United States v. Ewell, 383 U.S. 116, 124-25 (1966), is dispositive on this issue. The Court in Ewell makes it clear that when the first conviction has been reversed and the matter remanded, the slate has been wiped clean and the Government is free to prosecute the defendant on a different statutory violation regardless if it is considered the same or a separate offense.

<sup>1</sup>Poll does not allege that sec. 7202 is a lesser included offense within sec. 7206(1),

Poll further argues that the Government used the first trial as a "dry run," a tactic expressly forbidden by the court in Ashe v. Swenson, 397 U.S. 436, 447 (1970). Poll claims that the Government used the decision on the first appeal to obtain a tactical advantage in the second trial, by deciding to prosecute the defendant under a different statute carrying a lower burden of proof. Ashe is clearly distinguishable from the instant case, however, because in Ashe the defendant was acquitted in the first trial. In Ewell, the Supreme Court approved of the Government modifying its prosecution in this fashion, and the holding was not disturbed by its decision in Ashe.

Poll also argues that by approving the second trial we may be permitting the Government to circumvent the prohibition in North Carolina v. Pearce, 395 U.S. 711 (1969), against retaliatory sentencing. Pearce prohibits a trial court from increasing the sentence upon retrial without explaining the change in circumstances which warrants the increase. Poll, however, is not claiming that he has received a harsher sentence upon retrial, and therefore, has no ground for complaint.

#### Speedy Trial

Whether a delay in prosecution amounts to an unconstitutional deprivation of sixth amendment rights depends upon the circumstances. Ewell, 383 U.S. at 120. In this case Poll's trial after the new indictment on October 7, 1975 was set for November 10, 1975. In spite of the extremely expeditious setting, Poll argues that his right to a speedy trial was violated because the Government could have sought this indictment in March of 1974, along with the original indictment.

thus this case may be distinguished from Green v. United States, 355 U.S. 184 (1957).

"In these circumstances, the substantial interval between the original and subsequent indictments does not in itself violate the speedy trial provision of the Constitution." Ewell, *supra*, at 121. Here, the new indictment charging violation of sec. 7206(1) was brought well within the applicable statute of limitation, which is usually considered the primary guarantee against bringing stale criminal charges. See *Id.* at 122. Poll makes no claim of prejudice to the preparation of his defense. Instead, he claims that he experienced tremendous anxiety from the prolonged prosecution. The Government's conduct in this case was not oppressive and did not violate the defendant's right to a speedy trial.

#### Sufficiency of the Evidence

Viewing the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), we find it sufficient to support the conviction. Affirmed.

#### APPENDIX B

U.S., PLAINTIFF-APPELLEE v. Stanford Robert POLL, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, No. 74-2674, July 14, 1975, as amended Sept. 23, 1975.

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Appeal from the United States District Court for the Western District of Washington.

Before DUNIWAY and SNEED, Circuit Judges, and ANDERSON, District Judge.

SNEED, Circuit Judge:

#### Opinion

Appellant was charged in a two-count indictment for willfully causing P.B. Industries, Inc., a corporation of which he was president, to fail to truthfully account for and pay over employees' federal income withholding taxes on wages and social security (FICA) taxes for the first two quarters of 1973 in violation of 26 U.S.C. sec. 7202. That section is as follows:

#### Sec. 7202. Willful Failure To Collect Or Pay Over Tax.

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. August 16, 1954, c. 736, 68A Stat. 851.

The case was tried on stipulated facts and appellant was convicted on both counts.<sup>1</sup> The stipulation is set out in the margin.

<sup>1</sup> It is stipulated and agreed between the parties that the following matters may be considered as evidence without the necessity for further proof:

(1) During the year 1973, the defendant, Stanford Robert Poll, was the president of P.B. Industries, Inc., a corporation. During the first quarter of the year 1973, ending on March 31, 1973, the corporation had a gross payroll of \$77,266.51, from which the corporation should have deducted and collected Federal Income Taxes and Federal Insurance Contribution Act taxes in the amount of \$14,892.43; this amount was shown on the corporate books as having been withheld from wages. On or about April 30, 1973, within the Western District of Washington, P.B. Industries, Inc., mailed to the Internal Revenue Service a return, IRS Form 941, showing the amount withheld during the quarter as \$4,166.37. This sum, plus an additional \$1,315.17 for employer's FICA contribution, was remitted to the Internal Revenue Service. The defendant, knowing that approximately \$15,000.00 was owed to the Internal Revenue Service for the first quarter of 1973, directed that payment be made in the approximate amount of \$5,000.00. To accomplish this result, only one-third of the payroll was shown on the return, which Poll knowingly signed.

(2) During the second quarter of the year 1973, ending on June 30, 1973, the corporation had a gross payroll of \$82,631.21, from which it should have deducted and collected Federal Income Taxes and Federal Insurance Contribution Act taxes in the sum of \$15,599.78; this amount was shown on the corporate books as having been withheld from wages. On or about August 8, 1973, within the Western District of Washington, P.B. Industries, Inc., mailed to the Internal Revenue Service a return, IRS Form 941, showing the amount withheld during the quarter as \$10,726.86. This

Appellant here contends that sec. 7202 requires proof of both a willful failure to truthfully account and a willful failure to pay over and argues that his failure to pay over cannot be

sum, together with \$3,204.92 for employer's FICA contribution, was remitted to the Internal Revenue Service. The defendant, knowing that approximately \$15,000.00 was owed to the Internal Revenue Service for the second quarter of 1973, directed that only the amount unpaid for the first quarter be paid. To accomplish this result, the remaining two-thirds of the first quarter payroll was shown on the second quarter return.

(3) The defendant contends, and would introduce evidence tending to show, that the corporation lacked the liquid resources to pay the full amounts due, and that defendant intended to make up the deficiencies later, and in any event by January 31, 1974.

(4) The Government contends, and would introduce evidence tending to show, that the defendant did not intend to make up the deficiencies later and would not have done so had the deficiencies not been discovered.

(5) The Internal Revenue Service first interviewed the defendant concerning these matters on August 24, 1973, the deficiencies were made up (exclusive of interest and penalties) on May 10, 1974.

(6) The parties have entered into this stipulation for the sole purpose of obtaining a ruling on the legal issue what constitutes "willfulness" in the context of the facts of the present case. It is understood that the stipulation does not preclude the parties from putting on any evidence material to the cause, including the matters covered herein, in the event that the "willfulness" issue is finally resolved in favor of the defendant and the matter goes to trial on the factual issue what his intent was.

considered "willful" in light of his offer to prove that the corporation lacked the liquid resources to pay the full amounts due and that he intended to make up the deficiencies later.

The district court denied the offer of proof and held that the stipulation established a violation of sec. 7202. The memorandum decision of the district court states:

The court finds and holds such offered evidence is irrelevant and inadmissible, because sec. 7202 requires that the failure to truthfully account for and pay over the taxes be done 'willfully,' and such term does not require proof of an intent to defraud the Government, United States v. Klee, No. 73-2741 (9th Cir., 3/28/74 at p. 2), but 'connotes a voluntary, intentional violation of a known legal duty' accompanied by a 'bad purpose or evil motive.' United States v. Bishop, 412 U.S. 346 at 360, 361 (1973).

These actions raise two questions; viz. whether the foregoing definition of "willfully" is correct and whether the evidence offered to rebut the presence of willfulness was irrelevant and inadmissible. We hold that the definition is substantially correct but that the evidence offered is relevant under that definition and therefore admissible. The conviction is reversed and we remand to the district court for further proceedings consistent with this opinion.

We recent considered the meaning of "willfully," as it relates to a criminal penalty provided by the Internal Revenue Code, in United States v. Hawk, 497 F.2d 365 (9th Cir.), cert. denied, 419 U.S. 838 (1974). There we approved the following charge with respect to willfulness in a prosecution for failure to file income tax returns under 26 U.S.C. sec. 7203.

Now, we come to specific intent and willfulness. The specific intent of willfulness is an essential element of the crime of failing to make an income tax return. The term "willfully" used in the statute . . . means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent, or negligent. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under this criminal law.

. . . The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what the law requires (sic) to be done; that is to say, with the bad purpose to disobey or disregard the law that requires him to disclose to the Government facts and (sic) material to the determination of his income tax liability . . .

There is no necessity that the Government prove that the defendant had the intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of law. That is, the intention to avoid the law or to pay the taxes constitutes the crime charged by each of these counts as long as it is willful and knowing as I have defined the term for you. On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident, or due to his good faith misunderstanding of the requirements of the law, if there was such misunderstanding. (Emphasis added) 497 F.2d at 366 n. 2.

We held that it was not error to fail to include the words "and/or evil motive" in the emphasized portion of the above quoted charge. See also United States v. Durcharme, 506 F.2d 691, 693 (9th Cir. 1974); Cooley v. United States, 501 F.2d 1249, 1252-53 (9th Cir. 1974).

The definition of "willfully" employed by the trial court here does not depart significantly from that which we approved in Hawk. The offense charged here, however, is different from that in Hawk. There the offense charged was a willful failure to file federal income tax returns. Here it is a willful failure to truthfully account for and pay over taxes required to be withheld. Both the failure to truthfully account for and to pay over must be willful. We believe, and so hold, that the defendant's offer of proof regarding the liquid resources of the corporation and his intention to make up the deficiencies later was relevant and admissible in his effort to refute the willfulness of the failure to pay over. Hawk, addressed to a crime not involving a failure to pay, is not contrary to this holding.

We are guided by United States v. Andros, 484 F.2d 531, 533 (9th Cir. 1973) where we held that the financial circumstances of the accused are relevant in determining whether the failure to pay taxes is willful. Our decision in Andros, which involved prosecution of a willful failure to pay a tax under 26 U.S.C. sec. 7203, is rooted in Spies v. United States, 317 U.S. 492, 497-98 (1943) where the Court observed:

The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context, United States v. Murdock,

290 U.S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer. (Emphasis added.)

As Andros indicates, the relevance of the taxpayer's financial circumstances is not limited to instances in which he is charged with tax evasion under 26 U.S.C. sec. 7201. Nor do we think such circumstances are irrelevant to the proof of willfulness under 26 U.S.C. sec. 7202. We believe that to establish willfulness the government must establish beyond a reasonable doubt that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

Neither the legislative history of 26 U.S.C. sec. 7202<sup>2</sup> nor the reported cases thereunder

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<sup>2</sup>The first predecessor provision to sec. 7202 appears to be sec. 1004 of the Revenue Act of 1917 which applied to "whoever . . . fails to collect or truly to account for and pay over"

are inconsistent with our holding. Reversed and remanded.

any tax imposed by that Act. Sec. 1004 provided a penalty of not more than \$1,000 or imprisonment for not more than one year, or both, for failure "to collect [etc.]" and an additional penalty of double the tax "not collected [etc.]." No requirement of willfulness was set out in sec. 1004. The committee reports which accompanies the 1917 Act do not comment on the reasons for the specification of this new tax crime but it is reasonable to assume that sec. 1004 was prompted by the comprehensive scheme of excise taxes in the 1917 Act which placed the responsibility for collection on the vendor or manufacturer. E.g., secs. 315 (carbonated drinks), 500-03 (transportation and public utilities), 702 (admissions and dues).

The misdemeanor criminal penalty was continued in sec. 1308(b) of the Revenue Act of 1918 but a scienter requirement was added. Sec. 1308(b) imposed a fine of not more than \$10,000 or imprisonment for not more than one year, or both, together with the costs of prosecution on "Any person who willfully refuses to . . . collect, or truly account for and pay over" any tax imposed by specified titles concerning excise and special taxes. Such willful refusal also resulted in a penalty of the amount of the tax not "collected [etc.]" under sec. 1308(c). Sec. 1308(a) provided a penalty of not more than \$1,000 for failure "to collect [etc.]" with no requirement of willfulness. The legislative history is silent on the reasons for these changes and the new emphasis on willful refusals rather than mere failure to collect or truly account for and pay over. Sec. 1308 was reenacted as sec. 1302 of the Revenue Act of 1921 without change.

The penalties for failure "to collect [etc.]" were substantially changed by the Revenue Act of 1924. From the committee reports it appears that the House bill contained penalties substantially similar to the 1918 and 1921 Acts.

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See H.R. Rep. No. 179, pp. 45-46, 68th Cong. 1st Sess. (1924). The Senate, however, added a number of amendments which became part of the final Act. The stated purpose of these amendments was to provide "a complete system of penalties." H.R. Rep. No. 844, at 32. This system began the distinction between felonies and misdemeanors in the revenue laws and penalized willful "failures" rather than "refusals." Sec. 1017(a) of the 1924 Act designated willful failure to pay, make a return, keep records, or supply information as misdemeanors. Sec. 1017(b) set out two felonies punishable by a fine of not more than \$10,000, imprisonment for not more than five years, or both, together with the costs of prosecution. These two felonies were the willful failure "to collect or truthfully account for any pay over" any tax and the willful attempt to defeat or evade any tax. Sec. 1017(c) set out a third felony with the same punishment for aiding in the preparation of a false return or other document. Other than the need for a "complete system of penalties" the committee reports give no explanation for these major changes. It is clear, however, that Congress perceived a difference between those persons who had the duty to "pay" and those required "to collect, account for and pay over." Breach of the duty to pay was penalized as a misdemeanor. Breach of the duty to collect, etc., was penalized as a felony and was considered to be deserving of the same punishment meted out to tax evaders and those who aid in preparing fraudulent returns.

The 1924 Act also made certain changes in the civil penalties applicable to the failure "to collect [etc.]." The penalty of up to \$1,000 that had been provided in sec. 1308(a) of the 1918 Act for mere failure "to collect [etc.]," with no requirement of willfulness, was dropped because this additional penalty was "usually disproportionate to the offense." S. Rep. No. 398, at 45. Sec. 1017(d) provided a

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civil penalty of the amount of the tax not collected, etc., where there was a willful failure to collect, etc. This penalty was continued in the revenue laws and now appears as sec. 6672 of the 1954 Code.

The system of criminal penalties set out in sec. 1017 of the 1924 Act was continued in subsequent revenue legislation. Sec. 1114 of the 1926 Act; sec. 146 of the 1928 Act; sec. 145 of the Acts of 1932, 1934, 1936, 1938.

The felony penalty for willful failure "to collect or truthfully account for and pay over" appeared in various sections of the 1939 Code, each such section being applicable to taxes imposed under specified chapters or subchapters. Secs. 145(b) (income tax); 894(b)(2)(C) (estate tax); 1718(b) (admissions and dues); 1821(a)(2) (documents, playing cards); 2557(b)(3) (narcotics); 2707(c) (firearms). Cross-referencing made the penalties of these sections applicable to persons engaged in the collection of other taxes. For example, the penalties of sec. 1821 and sec. 2707 were made applicable to social security (FICA) taxes by sec. 1430 and to the withholding tax on wages by sec. 1627.

The multiplicity of the 1939 Code was ended by sec. 7202 of the 1954 Code which makes the felony penalty applicable to the willful failure "to collect or truthfully account for and pay over" any tax imposed by Title 26.